Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-218

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

R. G. KELLY
CHARLES Q. GAGE
C. LYNCH CHRISTIAN, III
JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322

LARRY L. ROLLER
SECRETARY AND COUNSEL
CARBON FUEL COMPANY
Suite 1300; One Valley Square
Charleston, West Virginia 25301

Counsel for Petitioner,
Carbon Fuel Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

1. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Conflicts With All Reported Decisions of This and Other Courts Concerning the Scope of Review Under Section 105, and Is Clearly Wrong 9

2. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Contravenes the Due Process Clause of the Fifth Amendment to the United States Constitution 12

3. This Case Involves Fundamental Constitutional Issues and Significant Practical Considerations Bearing Upon the Enforcement of the 1969 and 1977 Acts, Which Issues and Considerations Affect the Entire Coal Industry 14

CONCLUSION 15

APPENDIX A 1a

APPENDIX B 16a

APPENDIX C 23a

Page

CONSTITUTION:

U.S. CONST. amend. V 2, 12

CASES:

Freeman Coal Corp. 1 IBMA 1 (1970) 9

Fuentes v. *Shevin*, 407 U.S. 67, *rehearing denied*, 409 U.S. 902 (1972) 13

Itmann Coal Company v. *Secretary of Labor, Mine Safety and Health Administration*, Docket No. HOPE 78-356 (May 26, 1978) 15

Kanawha Coal Co. v. *Andrus*, 553 F.2d 361 (4th Cir. 1977) 10

Lucas Coal Co. v. *Interior Bd. of Mine Operations Appeals*, 522 F.2d 581 (3d Cir. 1975) 10

Lucas v. *Morton*, 358 F. Supp. 900 (W.D. Pa. 1973) ..10, 13

Miles v. *District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975) 13

Monterey Coal Company v. *Secretary of Labor, Mine Safety and Health Administration*, Docket No. VINC 78-372, et al. (June 19, 1978) 15

National Independent Coal Operators Ass'n v. *Kleppe*, 423 U.S. 388 (1976) 9

Peter White Coal Mining Corp. v. *Secretary of Labor, Mine and Health Administration*, Docket No. HOPE 78-371, et al. (June 16, 1978) 15

United States v. *Rumely*, 345 U.S. 41 (1952) 13

U.S. Steel Corporation v. *Secretary of Labor, Mine Safety and Health Administration*, Docket No. BARB 78-424 (June 29, 1978) 15

Page

STATUTES:

28 U.S.C. § 1254(1) (1970) 2

30 U.S.C. § 801 (1970) 3

Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1290, 30 U.S.C.A. § 801 (Supp. 1978) 3

30 U.S.C. § 814(b) (1970) 5

Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1301, 30 U.S.C.A. § 814(d) (Supp. 1978) 14-15

30 U.S.C. § 815(a)(1) (1970) 3, 5, 10, 11

30 U.S.C. § 815(b) (1970) 4

Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978) 3, 4, 10, 15

30 U.S.C. § 816(a) (1970) 7

Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1306, 30 U.S.C.A. § 816(a) (Supp. 1978) 7

30 U.S.C. § 819 (a)(3) (1970) 10

OTHER:

S. Rep. No. 181, 95th Cong., 1st Sess. 12 (1977), [1977] U.S. Code Cong. & Ad. News 5193, 5204 8

30 C.F.R. § 75.1712-2 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Carbon Fuel Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on May 9, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto in its entirety as Appendix A. The opinion of the Interior Board of Mine Operations Appeals of the United States Department of the Interior, 6 IBMA 20 (1976), is attached hereto in its entirety as Appendix B. The unreported opinion of

the administrative law judge is attached hereto in its entirety as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on May 9, 1978. A timely petition for rehearing was denied on May 31, 1978, and this petition for certiorari was filled within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is not a mine operator entitled to a review of the merits of a notice of violation issued by a mine inspector alleging a failure to construct facilities prior to (1) being forced to construct such facilities or (2) being issued an order closing the mine for an intentional failure to construct the facilities, thereby exposing himself to potential criminal liability?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

The Court of Appeals' decision was based upon the provisions of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the "1969 Act"), 30 U.S.C. § 801 *et seq.* (1970). The 1969 Act was recently amended by the Federal Mine Safety and Health Amendments Act of 1977 (hereinafter the "1977 Act"), Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1290, 30 U.S.C.A. § 801 *et seq.* (Supp. 1978), which transferred jurisdiction of mine safety and health matters to the Department of Labor and created the independent Federal Mine Safety and Health Review Commission to review controversies arising under the 1977 Act. The provisions of the 1969 Act relevant herein were altered by the 1977 Act to accommodate these changes, but no other substantive changes were apparently made. For the convenience of the Court, the relevant provisions of both the 1969 and 1977 Acts are reprinted below.

Section 105(a)(1) of the 1969 Act, 30 U.S.C. § 815(a)(1) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)], provided:

> "(a)(1) An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary [of the Interior] for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty

days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof or to the time fixed in such notice. The filing of an application for review under this subsection shall not operate as a stay of any order or notice."

Section 105(b) of the 1969 Act, 30 U.S.C. § 815(b) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)] provided:

"(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein."

Sections 105(a)(1) and (b) of the 1969 Act were amended by Section 105(d) of the 1977 Act, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978), which provides:

"(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary [of Labor] that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

STATEMENT OF THE CASE

This action was initiated by Carbon Fuel Company (hereinafter "the Company") before the Secretary of the Interior under Section 105 of the 1969 Act [30 U.S.C. § 815]. The Company sought review of a notice of violation issued under Section 104(b) of the 1969 Act [30 U.S.C. § 814(b)] for an alleged violation of 30 C.F.R. § 75.1712-2, which provides:

"Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be

centrally located so as to be as convenient for the use of the miners in all the mines served by such facilities."

The notice of violation alleged that the bathhouse serving the No. 6A-23 Drift Mine [1] was inconvenient for the miners, and gave the Company one month to abate the alleged violation by building a convenient bathhouse. The Company's application for review alleged that the time fixed for abatement was unreasonable, and that any time for abatement was unreasonable because the notice of violation was invalid.

The bathhouse in this case was constructed by the Company in 1967 along Field's Creek in the area of Winifrede, Kanawha County, West Virginia. The Company currently operates approximately six mines in this area and several other facilities, including a shop, supply house and cleaning plants. The bathhouse was designed to serve all of these mines and facilities, and was constructed at its present location because the site is centrally located to the Company's remaining coal reserves in the area. In addition, the site provides access to a good water supply, sufficient parking space and an adequate power supply, is directly across from the Company's store which provides additional security for the miners' personal possessions stored in the

[1] Production in the No. 6A-23 Drift Mine was discontinued on July 11, 1978, as a result of current mining economics. Miners are still employed and working in the mine, and the Company still operates five other mines in the vicinity which are served by the same bathhouse. All of these other mines are comparable distances from the bathhouse, and are therefor subject to the same allegation that the bathhouse is inconvenient. Accordingly, even if production is not resumed in the No. 6A-23 Drift Mine in the future, the validity of the notice of violation remains a crucial issue to the Company's continued operations in the area.

bathhouse, and is passed by the miners who utilize the bathhouse facilities on their way to and from work. Finally, the portals or openings in this area are short-lived [2] because the terrain consists of ridges and valleys with splits in the coal seams caused by valleys cutting through the seams, and the central location of the bathhouse maintains a continuity of bathhouse facilities for the men moving from opening to opening.

The United Mine Workers of America (hereinafter "UMWA") and the Mining Enforcement and Safety Administration of the Department of the Interior (hereinafter "MESA"), filed answers in opposition to the Company's application for review.

After expedited hearing, an administrative law judge issued a decision in which he determined the Company's bathhouse to be convenient and held that the notice of violation was invalid (Appendix C).

MESA and the UMWA appealed the administrative law judge's decision to the Interior Board of Mine Operations Appeals (hereinafter the "Board"), which rendered an opinion and decision affirming the administrative law judge's decision (Appendix B). The decision of the Board was the final decision of the Secretary of the Interior.

The UMWA sought review of the Board's decision in the Court of Appeals for the District of Columbia pursuant to Section 106(a) of the 1969 Act [30 U.S.C. § 816(a) (1970) (current version at Pub. L. 95-164, tit. II, § 201, 91 Stat. 1306, 30 U.S.C.A. § 816(a)(1) (Supp. 1978))]. The Court of Appeals reversed

[2] During the past 20 years the Company has opened and closed approximately 37 mines in this area. The length of operation of these mines has ranged from 13 years to 4 months, with an average life span of 2 years and 10 months.

the decision of the Board. In so doing, the Court of Appeals did not discuss the merits of the notice of violation. Instead, it ruled that a mine operator issued a notice of violation could obtain review in a Section 105 proceeding only of the time fixed by a mine inspector for abatement of the notice, and that the Board was without jurisdiction to determine the validity of the notice (Appendix A, pp. 2a, 15a). In effect, the Court of Appeals held that an operator issued a notice of violation must either (1) correct the alleged violation prior to a determination of its validity or (2) disregard the citation and thereby subject himself to an order closing his mine and potential criminal liability for an intentional violation of the law.

The Court of Appeals based its decision primarily on the legislative history of the 1969 Act, placing greater emphasis on such history than on contrary decisions and statements of this Court, the Courts of Appeals for the Third and Fourth Circuits, the District Court for the Western District of Pennsylvania and the Board (Appendix A, pp. 11a-12a, 13a n.50).

Prior to the decision by the Court of Appeals, the 1969 Act was amended by the 1977 Act. Although the language of the relevant provisions herein was modified by the amendments, the Court of Appeals found nothing in the amendments to change its view of how the 1969 Act would operate and specifically pointed out that enforcement proceedings under the 1977 Act were "patterned on the current Coal Act" (Appendix A, pp. 2a-3a n.3, *citing* S. Rep. No. 181, 95th Cong., 1st Sess. 12 (1977), [1977] U.S. Code Cong. & Ad. News 5193, 5204).

REASONS FOR GRANTING THE WRIT

1. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Conflicts With All Reported Decisions of This and Other Courts Concerning the Scope of Review Under Section 105, and Is Clearly Wrong.

In *National Independent Coal Operators Ass'n* v. *Kleppe,* 423 U.S. 388 (1976), this Court stated:

> "Under § 105, 30 U.S.C. § 815, an operator may apply to the Secretary [of the Interior] for review of the factual basis of any order or notice issued under § 104, or for review of the amount of time allowed for abatement of violations."

Id. at 391. No clearer statement concerning the scope of review under Section 105 could be made, particularly since this Court carefully delineated two types of review for Section 104 notices of violation, "review of the factual basis" and "review of the amount of time allowed for abatement of violations." The Court of Appeals avoided this definitive statement of the scope of Section 105 review by characterizing the statement as a "casual description" (Appendix A, p. 13a n.50). The resulting conflict in decisions, based upon a presumption of error on the part of this Court in a so-called "casual description," warrants review and clarification.

Such review is further warranted in light of the fact that this Court's construction of Section 105 is unanimously followed by all other reported decisions, including those of the agency charged with administering the 1969 Act. The Board was the first to construe Section 105 of the 1969 Act in *Freeman Coal Corp.,* 1 IBMA 1 (1970). In *Freeman,* the Board held that Section 105 review of the reasonableness of the time

fixed for abatement of a notice of violation required initial re.iew of the merits of the violation alleged in the notice. The Board's holding was based upon the logical "proposition that any time for abatement is an unreasonable time if no violation exists." *Id.* at 27. The Board's construction of Section 105 has been specifically approved by the United States Courts of Appeals for the Third and Fourth Circuits. *Lucas Coal Co.* v. *Interior Bd. of Mine Operations Appeals,* 522 F.2d 581, 583, 587 (3d Cir. 1975); *Kanawha Coal Co.* v. *Andrus,* 553 F.2d 361, 363 (4th Cir. 1977).

The United States District Court for the Western District of Pennsylvania has also considered the scope of review under Section 105 in *Lucas* v. *Morton,* 358 F. Supp. 900 (W.D. Pa. 1973). *Lucas* involved a constitutional challenge to the enforcement scheme of Section 105, and in particular, the fact that Section 105 could be read and applied to prohibit review of the merits of notices of violation. If so read, an operator issued an invalid notice of violation would be forced either to undertake erroneously required abatement action or accept a withdrawal order closing his mine for failure to abate, before being entitled to a hearing on the merits of the notice.[3] Plaintiffs in *Lucas* argued that such a construction of Section 105 deprived them of property without due process. The district court

[3] After abatement of a violation, an operator is entitled to challenge the fact of violation in a civil penalty proceeding. 1969 Act § 109(a)(3), 30 U.S.C. § 819(a)(3) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)]. A withdrawal order issued for failure to abate a notice of violation is subject to review in a Section 105 proceeding. 30 U.S.C. § 815(a)(1) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)].

agreed that serious due process problems existed, but avoided declaring Section 105 unconstitutional by concluding, as was done in the cases discussed *supra,* that Section 105 permitted review of the merits of a notice of violation.

The construction given Section 105 in the aforementioned decisions is clearly supported by the language of the 1969 Act, which provides in pertinent part:

> "(a)(1) An operator issued a notice pursuant to Section 104(b) . . . may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. . . ."

Plainly read, this language permits an operator to seek review of a Section 104(b) notice of violation "if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable." The language does not limit the rationale underlying a mine operator's belief of unreasonableness, nor does it restrict the Secretary's "review of the notice." Indeed, Section 105(b) of the 1969 Act specifically authorizes the "vacating, affirming, modifying or terminating" of notices of violation by the Secretary after review thereof. If anything, this language makes it clear that Section 105 contemplates review of the merits of a Section 104(b) notice because such "vacating" or "terminating" can occur only after a finding by the Secretary that the violation alleged in the notice did not exist.

2. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Contravenes the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Court of Appeals decision that Section 105 of the 1969 Act prohibits review of the merits of a notice of violation permits an inspector to enter a mine, issue a clearly invalid notice of violation (for example, alleging that all of the mining equipment is in violation of the law because it is painted yellow instead of orange) and require that the alleged violation be corrected (that is, that such equipment be painted orange) within a specified time. The mine operator, because he cannot seek review of the validity of the notice in a Section 105 proceeding, is forced either to undertake unnecessary corrective action or to await transformation of the notice into an order requiring him to withdraw all men from the mine, which forces discontinuance of mining operations. Either course of action involves substantial expense, numerous wasted man hours, and loss of coal production vital to the nation; yet one of the alternatives must be elected, despite the obvious invalidity of the notice of violation.

While this example may be carrying the effect of the Court of Appeals decision to its extreme, it is nevertheless entirely possible under its construction of Section 105. Indeed, the merits of this case produce no less absurd a result. In well reasoned opinions, an administrative law judge and the Board held that the Company's centrally located bathhouse does not violate the health and safety standard cited in the notice of violation. Yet, because the Court of Appeals ruled that such decisions improperly considered the merits of the alleged violation, the Company must now comply with

the "invalid" notice of violation by building an unnecessary bathhouse or await transformation of the notice into an order closing its mine for an intentional failure to construct such a bathhouse, with the potential for criminal sanctions.

The due process clause of the Fifth Amendment to the United States Constitution "requires an opportunity for a hearing before a deprivation of property takes effect." *Fuentes* v. *Shevin,* 407 U.S. 67, 88, *rehearing denied,* 409 U.S. 902 (1972). Applying this standard in *Miles* v. *District of Columbia,* 510 F.2d 188, 192 (D.C. Cir. 1975), the Court of Appeals of the District of Columbia held that a building that is alleged to be a menace to public health and safety may not be destroyed before the owner is given "sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law." No less protection is due a mine operator issued a notice alleging a violation of a mandatory health or safety standard, especially since such notice is based upon the unreviewed opinion of a sole mine inspector. The Court of Appeals' construction of Section 105, prohibiting review of the merits of such a notice until after abatement of the condition alleged to create a violation or the issuance of a withdrawal order, denies such protection. See *Lucas* v. *Morton, supra.*

Where a statute is ambiguous and permits alternative constructions, sound rules of statutory construction require an interpretation which will avoid a declaration of unconstitutionality. *United States* v. *Rumely,* 345 U.S. 41, 45 (1952). Accordingly, Section 105 must be interpreted to permit review of the merits

of notices of violation. The alternative is a declaration that the statute, insofar as it requires a mine operator to abate a notice of violation or suffer a withdrawal order for failure to abate before becoming entitled to a hearing on the merits of a notice of violation, is unconstitutional.

3. This Case Involves Fundamenal Constitutional Issues and Significant Practical Considerations Bearing Upon the Enforcement of the 1969 and 1977 Acts, Which Issues and Considerations Affect the Entire Coal Industry.

The Court of Appeals' interpretation of Section 105 renders unconstitutional the enforcement scheme of the 1969 Act. Although not specifically addressed in the Court of Appeals' decision, the due process issue must be considered. Unless considered, the Company will be required to correct a violation already determined to be invalid or await transformation of the notice of violation into an order closing the mine for an intentional failure to abate.

The importance of the Court of Appeals' ruling is not limited to this case or to the Company. The Court of Appeals specifically acknowledged the similarity between the review provisions of the 1969 Act and those of the 1977 Act,[4] indicating its decision would be no different if the 1977 Act's review provisions were involved (Appendix A, pp. 2a-3a n.3). Several administrative law judges of the Federal Mine Safety and Health Review Commission have since followed the Court of Appeals' decision and held that the validity of notices of violation issued under Section 104(d) of the 1977 Act [Pub. L. No. 95-164, tit. II,

[4] The pertinent review provisions are reprinted in the "Statutory Provisions Involved" section of this petition, *supra* at 3-5.

§ 201, 91 Stat. 1301, 30 U.S.C.A. § 814(d)] may not be tested in review proceedings under Section 105(d) of the 1977 Act [Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d)]. *Itmann Coal Company* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. HOPE 78-356 (May 26, 1978); *Peter White Coal Mining Corp.* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. HOPE 78-371, et al. (June 16, 1978); *Monterey Coal Company* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. VINC 78-372, et al. (June 19, 1978); *U. S. Steel Corporation* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. BARB 78-424 (June 29, 1978).

The Court of Appeals' decision limiting the scope of review under Section 105 of the 1969 Act has been and will continue to be used as a basis for limiting review under its counterpart in the 1977 Act. The enforcement scheme in the 1977 Act is a matter of great importance to the entire industry. Final resolution of the issue by this Court will avoid protracted disputes, facilitate enforcement of the 1977 Act, and permit continuation of the safe and efficient production of coal needed to fulfill the goals of the nation's energy program.

CONCLUSION

This case involves fundamental constitutional issues and significant practical considerations which affect the entire coal industry. The decision of the Court of Appeals conflicts with all reported decisions of this Court and other courts concerning the scope of review

under Section 105 of the 1969 Act. The Court of Appeals' decision construing Section 105 of the 1969 Act contravenes the due process clause of the Fifth Amendment to the United States Constitution.

For the reasons expressed hereinabove, the Company respectfully states that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

R. G. KELLY
CHARLES Q. GAGE
C. LYNCH CHRISTIAN, III
JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322

LARRY L. ROLLER
SECRETARY AND COUNSEL
CARBON FUEL COMPANY
Suite 1300; One Valley Square
Charleston, West Virginia 25301

Counsel for Petitioner,
Carbon Fuel Company

August 7, 1978

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1208

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

CECIL D. ANDRUS, Secretary of the Interior, RESPONDENT

CARBON FUEL CO., INTERVENOR

Petition for Review of an Order of the
Board of Mine Operation Appeals of the
Department of Interior

Argued March 17, 1977

Decided May 9, 1978

Judgment entered this date

Steven B. Jacobson, with whom *Harrison Combs* was on the brief, for petitioner.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Edwin E. Huddleson, III, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, and *William Kanter*, Attorney, Department of Justice, were on the brief, for respondent.

Charles Q. Gage for intervenor.

Before McGOWAN, ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Once again[1] we are confronted by a controversy generated by ambiguity in the Federal Coal Mine Health and Safety Act of 1969.[2] The issue on this occasion is whether a mine operator served with notice of violation of a health standard not posing imminent danger could obtain administrative review of the charge on the merits prior to issuance of an order commanding withdrawal of his miners from the affected area. We answer that question in the negative. Our decision is governed by the terms of the 1969 Act notwithstanding its displacement by new legislation in 1977,[3] and resultantly our opinion speaks largely to the past.

---

[1] See, *e.g.*, *Association of Bituminous Contractors, Inc.* v. *Andrus*, No. 75-1931 (D.C. Cir. Feb. 22, 1978); *UMW* v. *Kleppe*, 174 U.S.App.D.C. 328, 532 F.2d 1403, *cert. denied*, 429 U.S. 858, 97 S.Ct. 157, 50 L.Ed.2d 135 (1976); *Phillips* v. *Interim Bd. of Mine Operations Appeals*, 163 U.S.App.D.C. 104, 500 F.2d 772, (1974), *cert. denied*, 420 U.S. 938, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975); *National Independent Coal Operators Ass'n* v. *Morton*, 161 U.S.App.D.C. 68, 494 F.2d 987 (1974), *aff'd*, 423 U.S. 388, 96 S.Ct. 809, 46 L.Ed.2d 580 (1976).

[2] Pub. L. No. 91-1073, 83 Stat. 742, 30 U.S.C. §§ 801 *et seq.* (1970).

[3] Late last year Congress passed the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, which supersedes both the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and

---

Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772. By then this case had already been submitted to us for decision, and only less than a month ago did the new legislation become effective. Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. III, § 307, 91 Stat. 1322. None of the parties contend, nor does anything uncovered by our independent research suggest, that Congress intended any application whatsoever of the 1977 Act to administrative proceedings long since concluded under its 1969 predecessor, as is the situation here. See *id.* § 301(c). Compare *Swinton* v. *J. Frank Kelly, Inc.*, 180 U.S.App.D.C. 216, 218-219, 554 F.2d 1075, 1077-1078, *cert. denied*, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976) with *de Rodulfa* v. *United States*, 149 U.S.App.D.C. 154, 161, 164-167, 461 F.2d 1240, 1247, 1250-1253, *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed. 2d 220 (1972). See also *United States* v. *St. Louis, S. F. & T. Ry.*, 270 U.S. 1, 3, 46 S.Ct. 182, 183, 70 L.Ed. 435, 437 (1926); *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 315-317, 28 S.Ct. 537, 540, 52 L.Ed. 804, 807-808 (1908). And although we have no call to construe the 1977 Act itself, our investigation uncovered nothing in its language or legislative history that modifies our view of how Congress contemplated that the 1969 Act would operate on the matter here in issue. On the contrary, enforcement proceedings under the new Act generally are "patterned on the current Coal Act," S. Rep. No. 181, 95th Cong., 1st Sess. 12 (1977), [1977] U.S. Code Cong. & Ad. News 5193, 5204, notwithstanding that the 1977 counterparts of the relevant provisions of the 1969 Act are cast in substantially modified language. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1300, 1305-1306 (amending Federal Coal Mine Health and Safety Act of 1969, §§ 104(a), (b) & 105(d)).

Since the Secretary of the Interior, originally the respondent herein, had delegated his adjudicative responsibilities under the 1969 Act to the Board of Mine Operations Appeals, 43 C.F.R. § 4.500(a) (1976), the decision of the Board is properly the subject of this review. The 1977 Act, however, transferred administrative review to the Federal Mine Safety and Health Review Commission, see Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-1306 (amending Federal Coal Mine Health and Safety Act of 1969, § 105(d), 30 U.S.C. § 815(d) (1970));

I

Pursuant to the 1969 Act,[4] the Secretary of the Interior promulgated mandatory health and safety standards designed for the protection of coal miners.[5] To ensure compliance with those standards, the Mining Enforcement and Safety Administration (MESA), the authorized representative of the Secretary, made frequent inspections of mines.[6] If a MESA inspector determined that there was imminent danger from a breach of the standards, he issued a withdrawal order requiring removal of all miners from the imperiled area until the hazard disappeared.[7] If, on the other hand, the inspector found disobedience of a standard but no immediate threat to health or safety therefrom, he issued a violation notice fixing a reasonable time for its abatement.[8] That period

---

id. tit. III, § 301(c)(1)-(2), 91 Stat. 1318. The Secretary of the Interior remains as respondent because the new law provides that it "shall not affect suits commenced prior to [its effective date] and in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this section had not been enacted. . . ." *Id.* tit. III, § 390(c)(4), 91 Stat. 1319. The only exception is for suits involving investigative functions transferred to the Secretary of Labor, in which case that Secretary is to be substituted as a party. *Id.* Our suit, however, involves administrative review functions transferred to the Federal Mine Safety and Health Review Commission, *supra*, and we accordingly deny the joint motion of the Secretary of the Interior and the Secretary of Labor to add the Secretary of Labor as a respondent. See also note 58 *infra*.

[4] Federal Coal Mine Health and Safety Act of 1969, § 101, 30 U.S.C. § 811 (1970).

[5] 30 C.F.R. §§ 70.100 *et seq.* (1976).

[6] Federal Coal Mine Health and Safety Act of 1969, § 103, 30 U.S.C. § 813 (1970).

[7] *Id.* § 104(a), 30 U.S.C. § 814(a) (1970).

[8] *Id.* § 104(b), 30 U.S.C. § 814(b) (1970).

could be extended, but if it was not and if the violation persisted, a withdrawal order then followed.[9] Such an order could also emit, even without allowance for an abatement period, when there was an "unwarrantable" but not imminently hazardous failure to comply with the standards.[10]

A mine operator aggrieved by either a notice or an order could apply for administrative review.[11] Any necessary investigation was made, an opportunity for a hearing was provided,[12] and review of the administrative decision was available in the courts of appeals.[13] The Act specified civil penalties for noncompliance with its provisions or with health or safety standards formulated thereunder,[14] as to which the operator had the right to a trial de novo in a district court.[15] In the instance of a withdrawal order, the operator could obtain both administrative and judicial review of an inspector's conclusion that an imminently dangerous con-

---

[9] *Id.*

[10] *Id.* § 104(c), 30 U.S.C. § 814(c) (1970). The withdrawal order could issue only after the operator had been given two violation notices within a 90-day period and a finding had been made for each violation that it was caused by unwarrantable failure to comply with the Act.

[11] *Id.* § 105(a), 30 U.S.C. § 815(a) (1970), quoted in text at note 27 *infra*.

[12] *Id.*

[13] *Id.* § 106(a), 30 U.S.C. § 816(a) (1970).

[14] *Id.* § 109, 30 U.S.C. § 819 (1970).

[15] *Id.* § 109(a)(4), 30 U.S.C. § 813(a)(4) (1970). The new Act may not be so generous. See S. Rep. No. 181, *supra* note 3, at 46, [1977] U.S. Code Cong. & Ad. News at 5237. Under the 1969 Act, issues of fact that were or could have been litigated earlier in review proceedings before a court of appeals were not determinable de novo in the district court.

dition existed.[16] The pivotal question on this appeal is whether the operator could also litigate the facts prompting a notice of violation or only the question of the reasonableness of the time allowed for its abatement.

II

Carbon Fuel Company, the intervenor here, operates several short-lived mines in the Appalachian region of West Virginia, including one known as No. 6A, 23 Drift Mine.[17] That facility is three miles distant from Carbon's central bathhouse, which serves a total of six mines in the area.[18] After complaints by miners that, in contravention of the Secretary's regulations, the bathhouse was inconveniently located, a MESA official investigated and issued a notice of violation giving Carbon 30 days to abate.[19] Carbon resorted to administrative review, claiming that the time allotted for abatement was unreasonable and "that any period of time set for the abatement of such invalid Notice would be unreasonable." [20]

An administrative law judge ruled that he had jurisdiction not only to extend the abatement period but also to vacate the violation notice on the merits, because, in his words, " 'any time for abatement is an unreasonable time if no violation exists.' " [21] He then rejected MESA's

[16] Federal Coal Mine Health and Safety Act of 1969, §§ 105(a), 106, 30 U.S.C. §§ 815(a), 816 (1970).

[17] *Carbon Fuel Co.*, No. HOPE 75-800 (administrative law judge July 22, 1975), at 4, Joint Appendix (J. App.) 229.

[18] *Id.*

[19] *Id.* at 4-5, J. App. 229-230.

[20] Application for Review and Motion to Expedite Hearing and Decision at 2, J. App. 6.

[21] *Carbon Fuel Co., supra* note 17, at 7, J. App. 232, quoting *Freeman Coal Mining Corp.*, 1 I.B.M.A. 1, 27 (1970).

contention that the bathhouse was not conveniently situated for use by those working in No. 6A, 23 Drift Mine.[22] The Board of Mine Operations Appeals affirmed the initial determination on location without any reference to the question of its jurisdiction to dissolve the notice, as opposed to authority merely to pass upon the reasonsonableness of the time allowed for correction of the alleged violation.[23] Petitioner, United Mine Workers of America, then came to this court for further review, attacking both jurisdiction and the decision on the merits.[24]

III

The Federal Coal Mine Health and Safety Act of 1969 set forth in Section 105 the specifications governing administrative review of withdrawal orders and notices of violations.[25] Those provisions drew some rather large distinctions in scope between the two. The Secretary was empowered to grant temporary relief from a withdrawal order but not from the consequences of disobeying a violation notice.[26] In relevant part Section 105(a)(1) also provided:

> An operator issued an order . . . or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order. . . . An operator issued a notice . . . or any repre-

[22] *Id.* at 7-10, J. App. 232-235.

[23] *Carbon Fuel Co.*, 6 I.B.M.A. 20 (1976).

[24] Because of our disposition of the jurisdictional issue, we do not reach petitioner's contention concerning the existence of a violation.

[25] Federal Coal Mine Health and Safety Act of 1969, § 105, 30 U.S.C. § 815 (1970).

[26] *Id.*

> sentative of miners in any mine affected by such notice, may, *if he believes that the period of time fixed in such notice for abatement of the violation is unreasonable, apply to the Secretary for review* of the notice. . . . [A]n opportunity for a public hearing [shall be provided] at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof *or to the time fixed in such notice.*[27]

If this were the sole statutory directive concerning administrative review of orders and notices, we would be inclined—simply on the basis of the plain language of this section—to accept petitioner's contention that the only permissible challenge to a notice was one calling into question the reasonableness of the time for abatement. Section 105(a)(1) clearly differentiated withdrawal orders and violation notices: one affected by an order in any way could seek "review of the order," [28] while one aggrieved by a violation notice could apply for review only "if he believe[d] that the period of time fixed in the notice for abatement of the violation [was] unreasonable." [29] And while in the case of an order a litigant could "present information relating to the issuance and continuance of such order or the modification or termination thereof," [30] in the instance of a notice his offering was limited "to the time fixed in such notice." [31]

---

[27] *Id.* § 105(a)(1), 30 U.S.C. § 815(a)(1) (1970).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

Section 105, however, continued in subsection (b) in a somewhat ambiguous fashion:

> Upon receiving the report of . . . investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.[32]

That, considered alone, was susceptible to a reading empowering the Secretary to "terminat[e]" a "notice," an event which could logically occur only if the notice were reviewed on the merits. Statutory provisions are to be construed, however, not in isolation but together with other related provisions.[33] So treated, Section 105(b) could much more readily be interpreted as authorizing only such relief from orders and notices as was consistent with the highly specific directions in Section 105(a)(1) as to the issues respectively raisable upon challenges to the one or the other.

IV

Since perhaps we cannot with complete safety rest the statutory limits of administrative review upon the statutory text alone, we turn to the legislative history for guidance to the congressional intent,[34] and find that

---

[32] *Id.* § 105(b), 30 U.S.C. § 815(b) (1970).

[33] See *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525, 532-533 (1975), citing *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009, 1013 (1849); *Kokoszka* v. *Belford*, 417 U.S. 642, 650, 95 S.Ct. 2431, 2436, 41 L.Ed.2d 374, 381 (1974), citing *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194, 15 L.Ed. 595, 599 (1857).

[34] See, *e.g.*, *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343, 349

the history is fortunately unambiguous. The precursor of the 1969 statute, the Federal Coal Mine Safety Act of 1952,[35] while providing for administrative and judicial review of withdrawal orders, furnished no vehicle whatsoever for review of violation notices.[36] Similarly, in the legislative process leading to the 1969 Act, neither the bill initially passed by the House[37] nor that first approved by the Senate authorized review of notices of violation.[38] When, however, those bills—which in other respects differed—left the hands of conferees on behalf of the two chambers, the text of the review provisions of Section 105 emerged.[39] And the Conference Report delineates the scope of jurisdiction afforded by the 1969 review mechanism: it "provide[d] in Section 105(a) for review *solely* of the reasonableness of the time fixed in [the] notice."[40] The legislative history thus evidences plainly enough a congressional purpose to open up to

---

(1966); *United Shoe Workers* v. *Bedell*, 165 U.S.App. D.C. 113, 118, 506 F.2d 174, 179 (1974); *Portland Cement Ass'n* v. *Ruckelshaus*, 158 U.S.App.D.C. 308, 316, 486 F.2d 375, 383, *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1973); *National Petroleum Refiners Ass'n* v. *FTC*, 157 U.S.App.D.C. 83, 100, 482 F.2d 672, 689, *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1973).

[35] Act of July 16, 1952, ch. 877, 66 Stat. 692.

[36] *Id.*, 66 Stat. 699-702.

[37] S. 2917, reprinted in Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine and Safety Act of 1969, at 1402-1438 (Comm. Print 1975) (hereinafter cited as "Legislative History").

[38] S. 2917, Legislative History 782-912.

[39] S. 2917, Legislative History 1445-1506.

[40] H.R. Rep. No. 91-761, 90th Cong., 2d Sess. 69 (1969), Legislative History 1513 (statement of House managers) (emphasis supplied).

review only a single narrow question regarding violation notices.

If any further indicium of that intent were necessary, it would be found in the section-by-section analysis of the Conference bill, which Senator Williams—one of the sponsors of the Senate bill and a Conference Committee manager—introduced into the Congressional Record during the post-conference Senate debates. Addressing Section 105, the analysis states:

> Subsections (a), (b), and (c) establish a procedure for reviewing administratively withdrawal orders issued by an inspector, modifications or terminations of such orders by an inspector, and *the reasonableness of the time limits in notices*. . . .[41]

This passage not only confirms our understanding of the Conference Report's use of the word "solely,"[42] but like its progenitors it makes no reference to the possibility that a notice could be vacated or otherwise terminated on the merits.

Against this array of historical data, the Secretary can point merely to an administrative interpretation by the Board of Mine Operations Appeals to the effect that the notice-review provisions authorize some measure of consideration of violation notices on the merits. Several years ago, in *Freeman Coal Mining Corporation*,[43] the Board, without any discernible analysis of the problem, said:

> We accept, at least for purposes of the issues presently before us, the proposition that any time

---

[41] Legislative History 1603 (emphasis supplied).

[42] See text *supra* at note 40.

[43] *Supra* note 21.

for abatement is an unreasonable time if no violation exists.[44]

While the Secretary correctly notes that courts normally accord great weight to administrative construction of the statute administered,[45] such interpretations forfeit their entitlement to deference when they plainly conflict "with other indicia of the proper interpretation of" the statute.[46] As we have seen, the words of Section 105 (a),[47] viewed in the strong light of the straightforward legislative history,[48] argue irresistibly the other way.

Moreover, were we to read the review provisions as the Secretary urges, we would effectively obliterate the distinction which Section 105(a)(1) plainly made between administrative review of withdrawal orders and of violation notices.[49] It would have made no sense at

[44] *Freeman Coal Mining Corp., supra* note 21, 1 I.B.M.A. at 27. That proposition was accepted "for purposes of the issues presently before" the Board. *Id.* The Board reasoned only that "the Act itself nowhere expressly precludes review of the fact of violation," *id.* at 28, yet the proper question is not how much jurisdiction was precluded but how much was conferred.

[45] See, *e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165 (1971); *United States* v. *City of Chicago*, 400 U.S. 8, 10, 91 S.Ct. 18, 20, 27 L.Ed.2d 9, 12-13 (1970); *Udall* v. *Tallman*, 380 U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616, 619 (1965).

[46] *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411-412, 50 L.Ed.2d 343, 358 (1976); accord, *Laborers' Local 1057* v. *NLRB*, —— U.S.App.D.C. ——, ——, 567 F.2d 1006, 1015 (1977) ("[w]hile we respect an administrative agency's interpretation of a statute that it is entrusted with enforcing, in the end the paramount deference must be extended to Congress itself") (footnote omitted).

[47] See text at notes 25-27 *supra*.

[48] See text at notes 34-42 *supra*.

[49] See text at notes 27-31 *supra*.

all for Congress to have separately and differently articulated the scope of review of orders and notices if they were to be precisely the same. Particularly against the backdrop of the legislative history, we cannot assume that Congress intended its distinction to have no meaning.[50]

V

To be sure, the interpretation we ascribe to Section 105(a) could have worked some hardship on a mine operator who received a notice of violation but believed that he was in full conformity with the Act. He then would have been compelled either to abate the condition or to await transformation of the notice to a withdrawal

[50] See *American Horse Protection Ass'n* v. *Department of Interior*, 179 U.S.App.D.C. 246, 253, 551 F.2d 433, 440 (1977).

The Secretary also contends that the Supreme Court in *National Independent Coal Operators Ass'n* v. *Kleppe, supra* note 1, ruled that an operator could obtain administrative review on the merits of a violation notice. All the Supreme Court said was that "[u]nder § 105, 30 U.S.C. 815, an operator may apply to the Secretary for review of the factual basis of any order or notice issued under § 104, or for review of the amount of time allowed for abatement of violations." 423 U.S. at 391, 96 S.Ct. at 811, 46 L.Ed.2d at 584. The Court in that case was not specifically considering the breadth of review allowed. We are unwilling to assume that this casual description was intended as a definitive interpretation of the scope of permissible review.

The Secretary also points to two decisions, *Lucas* v. *Morton*, 358 F.Supp. 900 (W.D. Pa. 1973) (3-judge court), and *Lucas Coal Co.* v. *Interior Bd. of Mine Operation Appeals*, 522 F.2d 581 (3d Cir. 1975), and argues that they conflict with the conclusion we reach. To the extent that those courts differ in their interpretation of the review provisions, we must respectfully disagree. See also *Kanawha Coal Co.* v. *Andrus*, 553 F.2d 361, 363 (4th Cir. 1977) (noting, without criticism, "the position of the Secretary that" administrative review extends to "whether a violation existed . . . and whether the time for abatement fixed by that notice was reasonable").

order by a failure to abate, at which point he would have finally been entitled to challenge the existence of the violation.[51] On the other hand, a contrary construction would simply have transferred the hardship to the miners, and with a much more emphatic impact. Since a withdrawal order automatically removed miners from the area of the alleged health and safety violation, even prolonged review at that time of the order on the merits did not leave them at peril. When, however, only a notice had issued, review of the fact of violation would have subjected the miners to continuing their labors—perhaps for a substantial period—under conditions which, though not thought to be imminently dangerous,[52] were nonetheless believed to be unwholesome and in contravention of the Act's health and safety standards.[53]

In any event, the decision where the hardship should fall was one for Congress to make,[54] and, unconstitutionality aside,[55] neither we nor the Secretary has the prerogative to alter it. Congress made its choice clear when, in staking out goals for the 1969 Act, it solemnly declared that "[t]he first priority and concern of all in the coal mining industry must be the health and

---

[51] See Federal Coal Mine Health and Safety Act of 1969, § 105(a), 30 U.S.C. § 815(a) (1970).

[52] See *id.* § 104(b), 30 U.S.C. § 814(b) (1970).

[53] See also S. Rep. No. 181, *supra* note 3, at 30, [1977] U.S. Code Cong. & Ad. News at 5222 ("[t]he Committee believes that rapid abatement of violations is essential for the protection of miners").

[54] See, *e.g.*, *Barnes* v. *Costle*, —— U.S.App.D.C. ——, —— n.81, 561 F.2d 983, 994 n.81 (1977).

[55] Because no issue has been raised concerning the constitutionality of the statutory scheme, we do not pass on it here. But see *Lucas* v. *Morton*, *supra* note 50.

safety of its most precious resource—the miner. . . ." [56] That priority was reflected in the Act's review provisions, which did not tolerate either temporary relief from notices of violation [57] or, as we now hold, review on the merits of the violation charged while miners continued to work in the affected area. Only when the miners had been removed, or after the violation had been abated and civil-penalty proceedings instituted, did the operator become entitled to challenge the existence of conditions allegedly trespassing upon the Act. That, we think, was Congress' decree, and we must respect it.

The order of the Board of Mine Operations Appeals is reversed and the case is remanded [58] for further proceedings consistent with this opinion.

Reversed and remanded.

---

[56] Federal Coal Mine Health and Safety Act of 1969, § 1, 30 U.S.C. § 801(a) (1970). See also *UMW* v. *Kleppe*, *supra* note 1, 174 U.S.App.D.C. at 330-331, 532 F.2d at 1405-1406.

[57] See note 26 *supra* and accompanying text.

[58] As we noted earlier, note 3 *supra*, the Board of Mine Operations Appeals no longer exists and the Secretary of the Interior no longer is responsible for administrative review in this field, but pursuant to the new law we retained the Secretary as respondent. Although we are thus technically remanding to the Secretary, under the 1977 Act further proceedings to comply with this opinion will automatically take place before the Federal Mine Safety and Health Review Commission. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. III, § 301(c)(3), 91 Stat. 1318.

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF MINE OPERATIONS APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

CARBON FUEL COMPANY

IBMA 76-24 Decided February 20, 1976

Appeal by the Mining Enforcement and Safety Administration and the United Mine Workers of America from a decision by Administrative Law Judge Forrest E. Stewart, dated July 22, 1975, granting an Application for Review (Docket No. HOPE 75-800) and dismissing a Petition for Modification (Docket No. M 75-131) under the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Health Standards: Bathhouse and Change-room Facilities

A violation of 30 CFR 75.1712-2, requiring that bathing and change-room facilities be provided in a central location convenient to all the miners where such facilities serve the miners of more than one mine, is not proved when the evidence shows that the average distance from the six mines served is 2.1 miles and the portal of the mine farthest from such facilities is only 1.1 miles farther than the portal of the nearest mine.

APPEARANCES: Thomas A. Mascolino, *Assistant Solicitor*, Robert A. Cohen, *Trial Attorney*, for appellant Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., H. John Taylor, Esq., for appellant United Mine Workers of America; Charles Q. Gage, Esq., for appellee Carbon Fuel Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

Background

On May 22, 1975, a federal coal mine inspector issued Notice No. 3 SAD at Carbon Fuel Company's (Carbon) No. 6A, 23 Drift Mine at Winifrede, West Virginia. The notice, issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (Act),[1] cited the following condition.

> The bathing facilities and change rooms provided for the use of the miners at this mine, was not conveniently located in that the mine is located a distance of 4 miles from the present facilities.

The parties subsequently agreed that the 4-mile figure in the notice was in error and that the correct distance between the bathhouse and the 6A, 23 portal is actually 3 miles.[2] The standard alleged to be violated, 30 CFR 75.1712-2, provides:

> Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all the mines served by such facilities.

On June 2, 1975, Carbon filed an Application for Review of the above notice and a motion for expedited hearing. It contended that the time set for abatement (1 month) was unreasonable, alleged that the bathhouse facilities serving

---

[1] 30 U.S.C. §§ 801-960 (1970).

[2] Tr. 10, Applicant Exh. 1.

its 6A, 23 Drift Mine were centrally located, and that the notice was therefore invalid. Carbon also filed a motion for extension of time for abatement and a Petition for Modification of 30 CFR 75.1712-2.[3]

On June 9 and 10, 1975, an expedited hearing was held in Charleston, West Virginia. The following evidence was adduced at the hearing. Carbon's 6A, 23 Drift Mine was first opened in April 1974. It employs 41 men on two production shifts and produces approximately 300 tons of coal in a 24-hour period. The estimated life of the mine is 7 years. The 6A, 23 Drift Mine is one of six mines in Carbon's Winifrede Division. All six of the mines are served by the single bathhouse cited in the notice of violation. The table below lists the distance in miles from each mine to the bathhouse:[4]

6A, 23 Drift	3.0
Morton Mine	1.9
45 Mine	2.2
31 Mine	2.1
31-2 Drift	2.2
No. 38 (Strip)	2.2

The road from the bathhouse to the portal of the 6A, 23 Drift Mine consists of 1 mile of hard surface and 2 miles of dirt road. All but about six of the miners pass the bathhouse on their way to and from work.[5]

---

[3] The Petition for Modification was published in the *Federal Register* on June 17, 1975. It averred that the existing bathhouse facilities serving the 6A, 23 Drift Mine would at all times guarantee no less than the same amount of protection afforded the miners of this mine by the application of the above standard. It included a list of improvements contemplated for the existing facility if the Petition were granted.

[4] Applicant Exh. 1.

[5] Government Exh. 2.

Mining Enforcement and Safety Administration (MESA) Inspector Sonny A. Davenport, who issued the above notice, testified that he used his own judgment in making the determination that the bathhouse was not convenient for the miners at the 6A, 23 Drift Mine. He defined as "convenient" a situation where men could come out of a mine, take a shower, and change clothes without having to get into their cars and drive 3 miles (Tr. 129).

Mr. George M. Pritt, MESA Coal Mine Inspection Supervisor, who directed the inspector to issue the instant notice, testified that MESA had established no official policy or guidelines for interpreting the terms "convenient" and "centrally located" in 30 CFR 75.1712-2 (Tr. 23). He stated that the bathhouse was inconvenient with respect to the 6A, 23 Drift Mine to the extent that a man emerging from the mine "would be subject to at times being wet, hot, dirty, tired—he'd have in the winter time a cold automobile to enter and drive 15 minutes before he can arrive at a place to find the facilities for washing, cleaning up, and put on dry, clean clothes" (Tr. 22). According to Mr. Pritt, a centrally locally bathhouse would be one which was equidistant from all the mines it served. He felt that the bathhouse in the instant case was "reasonably convenient" (Tr. 58-59) for those mines within a 2-mile radius. On this basis, he found the bathhouse inconvenient for the miners at the 6A, 23 Drift Mine.

The Judge in his decision observed that Mr. Pritt's definition of "convenient" (a bathhouse located within 2 miles of a mine portal) conflicted with the inspector's definition (a bathhouse within walking distance of a mine portal). In view of the fact that MESA had no official guidelines for applying the terms of this regulation, he noted that the inspector's interpretation of convenient was vague and arbitrarily applied in an area where none of the mine portals was near enough to each other so that a centrally located bathhouse would be within walking distance. The

Judge also considered the fact that most of the miners passed the bathhouse on their way to and from work as having a bearing on convenience and concluded that MESA had failed to make out a prima facie case of the alleged violation. He therefore granted the Application for Review, vacated the Notice of Violation and dismissed without prejudice the Petition for Modification.

Contentions of the Parties

MESA contends that the inspector's interpretation of the term "convenient" was reasonable and that the Judge erred in rejecting it.

The UMWA contends that the Judge misinterpreted the term "convenient" and that MESA correctly "drew a line" between mine portals located 2 and those located 3 miles from the bathhouse.

Carbon contends that the decision of the Judge is supported by a preponderance of the evidence and should be affirmed.

Issue

Whether the Judge erred in concluding that MESA had failed to prove a violation of 30 CFR 75.1712-2.

Discussion

For the following reasons we think that the Judge correctly vacated the notice of violation. The subject regulation does not require either that a bathhouse be located at each mine portal or that a bathhouse be located within walking distance where such facility serves more than one mine. Indeed, the regulation is silent on limitations in terms of distance. It requires a bathhouse that serves more than one mine to be centrally located for the convenience of all the miners. In the present record the only fact of consequence which differentiates the 6A, 23 portal from the other portals in the Winifrede division is that the 6A,

23 portal is 8/10 of a mile farther from the bathhouse than the next closest portal. We cannot conclude that this increment in distance renders the 6A, 23 portal inconvenient with respect to the location of the bathhouse, especially when it is considered that most of the miners employed at the subject mine pass the bathhouse on their way home. We hold that under the facts of the present case the requirements of comfort and convenience prescribed by the regulation were met, and that the interpretations urged by MESA and the UMWA exceed those requirements.

Accordingly, the Judge's decision should be affirmed.

Order

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior, (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS AFFIRMED.

/s/ DAVID DOANE
David Doane
Chief Administrative Judge

I concur:

/s/ HOWARD J. SCHELLENBERG, JR.
Howard J. Schellenberg, Jr.
Administrative Judge

DISTRIBUTION:

Charles Q. Gage, Esquire
Jackson, Kelly, Holt & O'Farrell
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Carbon Fuel Company

Steven B. Jacobson, Esquire
United Mine Workers of America
900 Fifteenth Street, N.W.
Washington, D. C. 20005

Counsel for United Mine Workers of America

H. John Taylor, Esquire
United Mine Workers of America
P. O. Box 1313
1300 Kanawha Boulevard, East
Charleston, West Virginia 25325

Counsel for United Mine Workers of America

Thomas A. Mascolino, Esquire
Assistant Solicitor
Office of the Solicitor
U. S. Department of the Interior
4015 Wilson Boulevard, Ballston #3
Arlington, Virginia 22203

Robert A. Cohen, Esquire
Trial Attorney
Office of the Solicitor
U. S. Department of the Interior
4015 Wilson Boulevard, Ballston #3
Arlington, Virginia 22203

Counsel for Mining Enforcement and Safety Administration

Administrative Law Judge
Forrest E. Stewart

Mr. John Ashcraft, Director
West Virginia Department of Mines
Room E-151, State Capitol Bldg.
Charleston, West Virginia 25305

APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

July 22, 1975

CARBON FUEL COMPANY, *Petitioner*

v.

MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA), *Respondent*

UNITED MINE WORKERS OF AMERICA, *Respondent*

Application for Review

Docket No. HOPE 75-800

Notice of Violation No. 3 SAD
May 22, 1975

Petition for Modification

Docket No. M 75-131

Mine No. 6 A, 23 Drift

Decision

Appearances: Charles Q. Gage, Esq., Jackson, Kelly, Holt, & O'Farrell, Charleston, West Virginia, for Petitioner; Robert A. Cohen, Esq., Office of the Solicitor, Department of the Interior, for Respondent (MESA); H. John Taylor, Esq., United Mine Workers of America, Charleston, West Virginia, for Respondent (UMWA).

Before: Administrative Law Judge Stewart.

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned proceedings were filed in accordance with sections 105 and 301(c)[1] respectively of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 *et seq.*).

On June 2, 1975, Petitioner filed the Application for Review and a Motion to Expedite Hearing.

On June 2, 1975, Petitioner concurrently filed the Petition for Modification of a Mandatory Standard and a Motion for Extension of Time for Abatement.

By Notice issued June 3, 1975, the Application for Review was scheduled for expedited hearing on June 9, 1975, in Charleston, West Virginia.

The Mining Enforcement and Safety Administration filed on June 4, 1975, a Motion to Consolidate the above-captioned proceedings.

---

[1] Section 105(a)(1) of the Act provides in pertinent part as follows:

An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. • • •.

Section 301(c) provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

On June 9, 1975, the United Mine Workers of America filed an answer to the Application for Review in which it admitted the issuance of the Notice of Violation but denied all other allegations contained in Petitioner's Application. The UMWA concurrently, on June 9, 1975, filed an answer to the Petition for Modification.

An expedited hearing was commenced in Charleston, West Virginia on June 9, 1975. Witnesses were called on June 9 and 10, 1975, by MESA, the Carbon Fuel Company and the UMWA.

On June 11, 1975, MESA filed an answer to the Application for Review wherein it stated that "said Notice was properly issued pursuant to the provisions of Section 104(b) of [the Act] and that the time fixed in said Notice for the Abatement of the violation is reasonable. MESA further denies all other allegations contained in the subject Application for Review. WHEREFORE, the Mining Enforcement and Safety Administration prays that the Application filed herein be dismissed."

The Petition for Modification was published in the *Federal Register* on June 17, 1975, 40 Fed. Reg. 25609.

On June 19, 1975, MESA filed a Motion to Dismiss the Petition for Modification on the ground that the standard, 30 CFR 75.1712-2, is not subject to modification in a Section 301(c) proceeding since it is a mandatory health standard, *citing Cimmaron Coal Company*, Docket No. M 74-27, decided January 14, 1974.

By Notice issued June 23, 1975, the above-captioned proceedings were scheduled for a prehearing conference on June 25, 1975, in Charleston, West Virginia. All parties were represented at the prehearing conference where it was agreed that the proceeding involving the Petition for Modification of a Mandatory Standard would be postponed and the Application for Review expedited. The time limits for filing briefs and proposed findings and conclusions were set

and these documents were filed by Carbon Fuel Co. and MESA on July 8 and 9, 1975, respectively. At the prehearing conference the parties advised that the period for abatement had been extended to July 25, 1975.

Section 30 CFR § 75.1712-2 provides:

> Bathhouses, change rooms and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all mines served by such facilities.

II. Issue

Whether Petitioner's bathhouse facility for Mine No. 6A, 23 Drift, located near Winifrede, West Virginia, is centrally located so as to be convenient for the use of the miners at the mine within the meaning of 30 CFR 75.1712-2?

III. Findings and Conclusions

Carbon Fuel Company is the operator of several mines in the area of Winifrede, Kanawha County, West Virginia. The mining in this area is similar to mining in other areas of the Appalachian Region in that the terrain in this region consists of ridges and valleys with splits in the coal seams caused by the valley cutting through the seams (Tr. 179). The terrain in this region results in the opening of a number of mines with a short life to mine "islands of coal" (Tr. 163). This is true with respect to Carbon's operations in the Winifrede area and is also true for other operators in the region.

Carbon operates several mines and other facilities in the Winifrede area, including Mine No. 6; Mine No. 6A, 23 Drift; Mine No. 31 and No. 31—2 Drift; the Morton (No. 34) Mine; No. 38 (Strip) Mine; and Mine No. 45. Other facilities include a shop, supply house and cleaning plants (Carbon Ex. 1).

The 6A, 23 Drift Mine was first opened in April 1974, as part of the No. 6 Mine. It has held the separate designation of No. 6A, 23 Drift since April, 1975. The mine employs 41 men on two production shifts and produces approximately 300 tons of coal in a 24 hour period (Tr. 9). The nearest bathhouse facility to the portal of No. 6A Mine is located three miles away on Winifrede Road (Tr. 10). The road from the bathhouse of the 6A portal consists of one mile of hardtop surface road and two miles of dirt road (Tr. 11).

According to MESA's witness, George Martin Pritt, a Federal Coal Mine Inspection Supervisor, the question of whether the bathhouse facilities were centrally located or convenient for the miners' use was never raised in connection with the portal now known as the No. 6A Mine, 23 Drift from the time that the mine was opened in April, 1974 until February, 1975 (Tr. 51). The question arose, according to UMWA's witness Fitchue L. Philyaw, Regional Safety Coordinator for the UMWA, in late January or early February when he responded to a complaint from some of the miners on the third shift who had found the bathhouse facilities dirty when they arrived, the dirt and mud having been left by the day shift workers who had departed earlier (Tr. 113). When Mr. Philyaw, UMWA, arrived to personally investigate the complaints, he learned that the miners were not working on that particular day (Tr. 113). Mr. Philyaw testified that, in answer to his question put to some miners standing outside the bathhouse whether the allegedly dirty conditions were responsible for the miners not being worked, some of them said, "No. The main thing it is the road is so bad we can't get to the mine" (Tr. 114). Mr. Philyaw further testified that "[s]ome of them [said], 'if we had a bathhouse and you would get off your fanny and start enforcing the law like you should we could stop a lot of this.' I [Philyaw] said, 'What do you want?' They responded 'We want a bathhouse' " (Tr. 114). Thereafter Mr. Philyaw filed an official complaint (Gov't Exhibit #1) wherein it was stated that

"the present bath house . . . is not centrally located" and that a bath house . . . at each individual mine . . . would be *much more convenient* (emphasis added) for the men." Mr. Philyaw testified that two or three days thereafter the president of the local union, Mr. Lester Kincaid, had called him and had asked about the procedure required to "work out some kind of deal up here," interpreted by Mr. Philyaw to mean a withdrawal of the complaint (Tr. 114). Thereafter Mr. Kincaid again called Mr. Philyaw and said, "We've changed our minds. We want a bathhouse" (Tr. 115). In response to the complaint, Inspection Supervisor George M. Pritt, between February 19 and 24, 1975, made an investigation of the location of the bathhouse facilities at the applicant's Winifrede Mine complex. Inspector Pritt, visited the bathhouse facilities and portals in question, spoke to both the company officials and the miners and made a determination of the approximate distances involved. In his report submitted on February 26, 1975, (Gov't Exhibit #2) Inspector Pritt stated in pertinent part:

> The Nos. 13, 25, and 23 drift portals serving the No. 6 mine [subsequently redesignated as the No. 6A Mine with respect to the No. 23 drift] are distances of 8 and 4 miles from the bathhouse facilities; therefore these facilities are not centrally located so as to be convenient for the use of miners at this time.

On February 24, 1974, Inspector Sonny A. Davenport issued a 104(b) notice of violation at the Carbon Fuel's No. 6 Mine, for violation of 30 CFR 75.1712-2. On March 14, 1975, Carbon Fuel applied for a waiver of the requirements of 75.1712-2 pursuant to 30 CFR §§ 75.1712-4 and 75.1712-5 (Gov't Exhibit #4) which application was denied by letter submitted to the company on April 17, 1975, from James Krese, District Manager of the Mining Enforcement and Safety Administration (Gov't Exhibit #4(a)). On May 6, 1975, Inspector Davenport modified his original notice to exclude the No. 6A Mine, since it was no longer part of the

No. 6 Mine. Inspector Davenport returned to the mine on May 22, 1975, and issued notice No. 3 S.A.D. (Gov't Exhibit #5) giving the operator until June 23, 1975, to abate the condition.

During the hearing there was testimony as to the meaning or interpretation definition of "convenient" and "centrally located" and as to the elements or factors considered in making a determination whether a bathhouse was in compliance with the requirements.

With respect to this determination, George M. Pritt, testified that MESA had established no guidelines for use in this area (Tr. 23). Moreover, Mr. Pritt stated that he had received no guidance from his supervisor, Mr. Weekley, the Subdistrict Manager (Tr. 65) and that he was not aware of any changes made in his report by persons at a higher level (Tr. 66).

Mr. Pritt indicated that the distance and driving time between the bathhouse and the mine portal concerned went into *his interpretation* (emphasis added) of the meaning of "convenient" (Tr. 20, 22). Mr. Pritt stated that the actual distance from the 23 Drift to the bathhouse was three miles and not the four miles stated and relied upon in his earlier investigation report and two Notices of Violation issued subsequently (Gov't Exhibits #2, #5, Tr. 22). Mr. Pritt distinguished between "completely convenient," "reasonably convenient," and "inconvenient," saying that he interpreted the present situation as "inconvenient to the extent that a man leaving the mine portal at this particular place would be subject to at times being wet, hot, dirty, tired—he'd have in the winter time a cold automobile to enter and drive fifteen minutes before he can arrive at a place to find facilities for washing, cleaning up, and put on dry, clean clothes" (Tr. 21-2).

Little or no help was given to Inspector Davenport by MESA guidelines, case law, or the legislative history of the Act. Therefore, the Inspector turned to his own experience

as a miner and the assistance of his supervisor, Inspector Pritt (MESA's Brief, 4, Tr. 132). Inspector Davenport stated that he used his own independent judgment in making a determination, that the location of bathhouse facilities were not convenient to the miners at the 6A portal (Tr. 128). *He defined* (emphasis added) "convenient", "as enabling a man to come out of the mine, take a shower and change clothes without having to get in his car and drive three miles" (Tr. 129). *He relied on Inspector Pritt's original investigation,* (emphasis added), and then made his own determination as to whether the violation existed (Tr. 129), although he did acknowledge the direction by Mr. Pritt for its issuance (Tr. 140). Among the factors he considered were: the distance from the bathhouse to the 6A portal, the time it took to travel that distance, the muddy and wet condition of the miners' clothes and the health and safety factors involved (Tr. 126, 131).

Mr. Pritt's understanding of the word "central" was that the distances from the portals to the bathhouse would be equal (Tr. 23). Mr. Pritt stated that although there were no guidelines on this particular point, he made a determination that the bathhouse would be reasonably convenient for those mine portals located within a two-mile radius thereof (Tr. 23) and, on this basis, he found in the course of his investigation that the bathhouse facilities were reasonably convenient for the use of the miners who enter the portals serving the No. 31, the No. 34 (Morton) mines, and the 31-2 drift, located at a distance of 2.1, 1.9, and 2.2 miles respectively (Tr. 57). On this same basis, the mine in the instant case, 23 Drift—located .8 miles farther away from the bathhouse facilities (3.0 miles in all, Applicant's Exhibit #1, Tr. 54), was found in the investigation report to be inconvenient for the use of the miners.

There was testimony that all but six of the miners at the No. 6 Mine [including the 23 Drift, now part of the No. 6A Mine] pass by the bathhouse (Gov't Exhibit # 2, Tr. 54).

Other roads which miners might use in traveling to and from work intersect with the paved road coming from the bathhouse at a distance of one mile (Tr. 48).

Mr. Pritt testified that the bathhouse facilities included, by his rough count, approximately 250 baskets plus a combination of 29 lockers and baskets (Tr. 14), but he later indicated that he would not dispute a total of 350 baskets plus the combination of 29 (Tr. 49). Government Exhibit No. 4 indicates that 23 Drift employs a total of 32 persons, however, testimony was given that indicates a total of 41 persons (Tr. 9). There was conflicting testimony as to the total number of miners who might use the bathhouse, ranging from approximately 268 (Tr. 173) to over 500 (Tr. 13).

Although there was testimony given on the elements or factors (including life of the mine (Tr. 70), distance from the existing bathhouse (Tr. 77), number of miners employed and on which shifts (Tr. 28), cost of a new facility (Tr. 77), additional compensation in lieu of bathhouse (Tr. 28, 69), and availability of water (Tr. 77)) which would be considered in determining whether or not a waiver would be granted pursuant to 30 CFR §§ 75.1712-4 and -5, such discussion is not entirely germane to the threshold issue of whether the bathhouse was centrally located so as to be convenient for the use of the miners and derivatively, whether the Notice of Violation was validly issued.

Based on the foregoing testimony and the exhibits introduced into evidence, I find that the Mining Enforcement and Safety Administration has failed to make out a prima facie case of a violation of 30 CFR 75.1712-2 and that the Notice of Violation No. 3 SAD, May 22, 1975 (Gov't Exhibit #5), was improperly issued.

In *Freeman Coal Mining Corporation,* 1 IBMA 1 (1970) at pages 27 and 28, the Board of Mine Operations Appeals stated:

> • • • We accept, at least for the purposes of the issues presently before us, the proposition that any

time for abatement is an unreasonable time if no violation exists. Hence, the truth of the Bureau's allegations of violation, and the legal sufficiency of the facts claimed to constitute a violation, may be challenged by an applicant seeking review of a section 104(b) notice.

The interpretation of "centrally located" as it is used in the regulation, while certainly involving the notion of reasonably uniform distance between a bathhouse and any mine portal which such facility is intended to serve, also includes the concept of centrality with respect to the travel route that the miners take in going to and from work since the balance of the provision adds "so as to be convenient for the use of the miners in all the mines served by such facilities." That this is a necessary consideration can be shown in a hypothetical situation where the bathhouse would be equidistant from several mines, yet the miners' homes or the road leading to them would be on the side of the mines that was opposite from the bathhouse. In such a situation the miners would all have to pass the area where the mines were located to go to the bathhouse and then in essence backtrack to get to the mines, repeating the duplicative process at the end of the shift. In the instant case, the evidence indicates that all but six of the miners working at the No. 6 Mine (which includes the after-designated No. 6A Mine) pass the bathhouse on the way to and from work (Gov't Exhibit #2).

Based on the evidence adduced at the hearing, I find the inspector's interpretations of "convenient for the use of the miners" to be vague and arbitrarily applied.

Both of MESA's witnesses stated that they had no guidelines to assist in the interpretation of the language of the Regulation (Tr. 23, 132).

Mr. Pritt, one of MESA's witnesses, testified that distance was a consideration in his interpretation of "convenient" (Tr. 20, 22), yet the evidence indicates that the

initial investigation report (Gov't Exhibit #2) as well as both the initial Notice of Violation No. 1 SAD, February 24, 1975 and the notice involved in the present proceeding, Notice No. 3 SAD, May 22, 1975, (Gov't Exhibit #5), issued because No. 6 Mine, 23 Drift was redesignated as the No. 6A Mine (Tr. 30), all used the erroneous figure of four miles instead of three miles as the distance from the bathhouse to the 23 Drift (Tr. 22). I do not intend to hold that the demarcation between convenient and inconvenient occurs at a precise mileage figure.

Mr. Davenport, MESA's other witness, testified that he interpreted "convenient" as "enabling a man to come out of the mine, take a shower and change clothes without having to get in his car and drive three miles" (Tr. 129). This interpretation renders meaningless the provision in the Regulation permitting one facility to serve more than one mine when coupled together with the experience of his supervisor, Mr. Pritt, which recalls no situation in which two mine portals were within walking distance (Tr. 98).

Mr. Pritt's interpretation that a bathhouse located 2.2 miles from a mine portal is convenient for those miners (Tr. 57) directly conflicts with Mr. Davenport's interpretation that a bathhouse is inconvenient if the miners who would use it have to drive to get to it (Tr. 151).

There was testimony that driving time was a factor in the interpretation of "convenient", yet estimates of the driving time ranged from seven and 15 minutes (Tr. 48, 11).

The safety of the miners while driving down from the portal to the bathhouse was given as a factor affected by the location of the bathing facilities in that in the cold weather a miner was liable to go over the bank or run into someone (Tr. 118, 131, 151), yet there was testimony that there is no knowledge of any accidents occurring on the road (Tr. 178) and that the bathhhouse's present location made it possible for the miners to ride together in some-

one's car to and from the mine, resulting in a reduction of traffic on the dirt road which is also used to truck coal (Tr. 180). It is difficult to perceive how the cited hypothetical danger of going over a bank or running into someone in cold weather could be eliminated by a centrally located bathhouse.

In discussing the present location of the bathhouse with respect to the health of the miners at the 23 Drift, Mr. Pritt admitted that he had no data which might show a correlation between distance from the portal to the bathhouse and the miners' health nor did he have any data which compared the health of the miners in 23 Drift with that of the miners working in mines situated closer to the bathhouse (Tr. 102). With respect to the health and safety factors involved, Mr. Davenport stated he never used bathing facilities at any of the mines after conducting an inspection, inspections that usually lasted four to five hours underground per day (Tr. 136), before returning to Montgomery, West Virginia, one hour's driving time from the present area (Tr. 137).

Mr. Philyaw's initial complaint (Gov't Exhibit #1) stated that it would be "much more convenient for the men" if a bathhouse were to be placed at each individual mine. The fact that such an arrangement would obviously be more comfortable does not indicate inconvenience under the terms of the regulation and in fact the language of the regulation precludes such a finding. The possibility of differing interpretations by inspections is illustrated by Supervisor Pritt's distinctions between absolutely convenient, reasonably convenient, and inconvenient. This flexible but vague approach to the matter is completely at variance with Inspector Davenport's approach that the bathhouse must be located within walking distance (Tr. 151).

It is clear from the language of the Regulation that it was not intended that there must be a separate bathhouse for each mine if the bathhouse meets the specified criteria.

The last sentence of the Regulation provides that where such facilities are designed to serve more than one mine, they shall be centrally located so as to be convenient for the use of the miners in all of the mines served by such facilities.

It is established by the evidence that none of the mine portals in this area were near enough to each other so that the miners could walk to a centrally located bathhouse and there was no evidence in the record to indicate that the miners could ordinarily do so in other mines in different areas. Such facilities are not required by the Regulation if they meet the other specified criteria.

In this case there seems to be little difference in the degree of convenience between the mine 2.2 miles from the bathhouse and the mine 3 miles from the bathhouse. In both instances the bad roads from the mines must be traveled in order to get to the improved road leading to the bathhouse. Once the improved road is reached and the car is heated, the additional .8 of a mile should make little difference in time or convenience.

The interpretation of "convenient" includes more than just consideration of distance and driving time. It also includes the elements of comfort and stability or continuity in working habits or patterns as well as safety or protection of the individual's personal effects. Applicant's witness, Mr. Lewis N. Thomas, Jr., Senior Vice President for Operations, testified that the present bathhouse was constructed with the element of continuity in mind—that the miners could continue to use the facilities as active operations progressed in the area surrounding the bathhouse (Tr. 160, 165). Mr. Thomas also stated that consideration was given to the protection of personal belongings when the bathhouse was situated across the road from the "company store" (Tr. 163).

The several briefs and proposed findings filed by the parties to these proceedings have been carefully reviewed.

To the extent that these post-hearing documents are inconsistent with the findings and conclusions set forth herein, they are rejected.

Since I find that there was no violation of 30 CFR 75.1712-2 the Petition for Modification of a Mandatory Standard thus becomes moot and will be dismissed without prejudice. Under this decision MESA's motions to consolidate the proceedings and to dismiss the Petition for Modification because 30 CFR 75.1712-2 is not a mandatory safety standard become meaningless.

Order

Accordingly, IT IS ORDERED THAT

(1) the Application for Review is Granted and the Notice of Violation No. 3 SAD, dated May 22, 1975, is hereby VACATED, and

(2) the Petition for Modification in the above-captioned proceedings is DISMISSED without prejudice.

/s/ FORREST E. STEWART
Forrest E. Stewart
Administrative Law Judge

Issued: July 22, 1975

Distribution:

Robert A. Cohen, Trial Attorney, Office of the Solicitor, U.S. Department of the Interior, 800 North Quincy Street, Arlington, Virginia 22203

Charles Q. Gage, Jackson, Kelly, Holt & O'Farrell, P.O. Box 553, Charleston, West Virginia 25322 (Certified Mail)

H. John Taylor, Esq., United Mine Workers of America, P.O. Box 1313, 1300 Kanawha Boulevard, East, Charleston, West Virginia 25325 (Certified Mail)

Steven B. Jacobson, Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. 20005 (Certified Mail)

Assistant Administrator, Mine Health and Safety, MESA, U.S. Department of the Interior

Standard Distribution